IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 938 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

POPATLAL AMRATLAL SHAH

Versus

KESTAN CHEMICALS CORPORATION

Appearance:

MR PV NANAVATI for Petitioners

MR VC DESAI for Respondent No. 1, 2

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 31/03/2000

ORAL JUDGEMENT

The appellant-original plaintiff filed this first appeal challenging the judgment and order passed in Civil Suit No. 3710/1973 by the City Civil Court, Ahmedabad, dismissing the suit against the defendants no. 2 and 3 with costs.

The facts giving rise to the present first appeal can briefly be summarised as under:

One Popatlal Amratlal, sole proprietor of the firm of Pari Popatlal Amratlal filed the suit against the defendants to recover the sum of Rs. 3100/ on the plea that the plaintiff had advanced a loan to defendant no. 1 for which defendant no. 3 on his behalf and on behalf of the defendant no. 2 had stood as surety. It is the case of the plaintiff that the defendant no. 1 started business relations with the plaintiff to take advance on interest for which defendant no. 2 and defendant no. 3 became sureties, vide exh. 43. For the advance of Rs. 3000/, the defendant no. 1 issued a cheque to the plaintiff on 14.9.73, which was dishonoured when it was presented for payment. The plaintiff served the defendant with notice dated 14.9.73, but it was neither complied with nor replied. The plaintiff has claimed Rs. 80/ as interest from 14.9.73 to the date of the suit and Rs. 20/ as notice charges. Thus, the plaintiff claimed Rs. 3100/ from the defendant. At the stage of summons for judgment, exparte decree was passed against the defendant no. 1 for the suit claim and further interest, as evidenced by ex. 18. The suit claim had been contested by defendants no. 2 and 3 and defendants no. 2 and 3 were given unconditional leave to defend the suit.

The defendants no. 2 and 3 vide written statement ex. 20 while disputing the claim of plaintiff pointed out that the defendant no. 2 is the partnership firm of which defendant no. 3 is a partner. It was contended that defendants no. 2 and 3 had agreed to be the sureties for the advance that may be made by the plaintiff to defendant no. 1, only for a period of one year, that is to say for the S.Y. 2025. According to them, the plaintiff has entered into transaction with defendant no. 1 independently of the surety agreement and at one point of time he had even advanced Rs. 7000/ to defendant no. 1. They have denied that the surety agreement discloses the transaction to be of a nature of a continuing guarantee. According to them, the plaintiff advanced only Rs. 3000/ to defendant no. 1 and, if that limit has been exceeded, the defendants no. 2 and 3 would be discharged. It is their further say that they had not stood as a guarantors for the actual amount on which the suit is based, and, therefore also the plaintiff cannot have any decree in his favour and against them.

Mr PV Nanavati, learned counsel for the appellant

submitted that the trial court has committed an error in coming to the conclusion that on account of variation in terms of contract, the defendants no. 2 and 3 are discharged from their liability undertaken at Ex. 41. Mr. Nanavati further submitted that the trial court erred in rejecting plaintiff's case on account of interest. In the submission of Mr Nanavati, the aforesaid findings are contrary to the evidence on record. I have gone through the oral evidence of plaintiff recorded at ex. 46 and the evidence of defendant no. 3 at Ex. 44. Reading the evidence of the plaintiff, it appears that the plaintiff advanced loan to defendant no. 1 on 18.7.68, however, the amount was repaid by him and the present suit is based on advance to defendant no. 1 made on 28.10.72. According to the evidence of defendants, the surety bond ex. 43 given for the amount advanced on 18.7.68 and, since it was repaid, the defendants no. 2 and 3 ceased to be the sureties and the plaintiff has no cause of action against them for subsequent finance if any given to defendant no. 1 for the loan advanced on 28.10.72 and the defendants no. 2 and 3 cannot be held responsible as guarantors of the defendant no. 1. The learned trial judge after appreciating the contents of security bond ex. 43 has recorded a finding at ex. 43 creates continuing guarantee and, since the guarantee was not revoked till the suit transaction, the defendant no. 2 cannot contend that they had not stood as sureties for the amount advanced by the plaintiff to defendant no. 1 on which the present suit is based. In my opinion, the said finding recorded by the learned trial judge cannot be faulted with. I am also in total agreement with the said finding. However, on account of variance in the terms of contract, the defendants no. 2 and 3 are discharged from their liability. This I will demonstrate hereinafter.

It is the case of the plaintiff in his evidence that when he gave first loan of Rs. 3000/ on 18.7.68, he calculated interest at the rate of 12%. It is his further say that the defendant no. 1 was further advanced Rs. 2000/ on 6.9.68 and for that advance also, the interest was charged at 12% per annum. However, when the third loan was advanced on 28.10.1968 and for all the rest of the loans till the suit loan, the plaintiff had charged 15% interest. As per the admission of the plaintiff in his evidence, he has not served any written notice to the defendant no. 2 and 3 for the increase in the rate of the interest for the loans which were advanced to the defendants in that year. The increase in the rate of interest is indeed a variation from the date of interest on which the first loan was charged. In my

opinion, this is a departure from the original loan and must be taken into account while considering the question namely, whether on account of variance in terms of contract, the defendants no. 2 and 3 are discharged from their liability or not. Apart from this variations of the interest part, it has also come in evidence that during the course of the transaction, the plaintiff advanced Rs. 7000/ in cash to defendant no. 1 on 28.2.72. That amount was repaid by defendant no. 1 in cash on 7.4.72. The plaintiff has admitted in his evidence that when he paid this amount of Rs. 7000/ to the defendant no.1, there was a pending recovery of Rs. 3000/ for the sums which were advanced to him earlier. Now this is the second important variation from the original terms of the security bond. The security by defendant no. 3 is therefore, upto the limit of Rs. 3000/. The advance given by plaintiff to defendant no. 1 of Rs. 7000/ is, therefore, clearly in further variation of the terms of the contract. The plaintiff cannot give an amount larger than originally stipulated in the security bond and then to say that in fact there is no variation in the terms of the contract since he does not want to hold defendant no. 3 liable for more than Rs. 3000/.

Section 133 of the Indian Contract Act, provides that any variance, made without the surety's consent in the terms of the contract between the principal (debtor) and the creditor, discharges the surety as to transactions subsequent to the variance.

In view of this provision, I am clearly of the opinion that the defendants no. 2 and 3 cannot be held liable for something for which they have not contracted.

In this view of the matter, the learned trial judge was perfectly justified in rejecting the claim of the plaintiff against defendants no. 2 and 3. There being no substance in this first appeal, it is dismissed.

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